

THE ENVIRONMENTAL LAW DIVISION BULLETIN

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COURT FINDS ZERO LIABILITY FOR CERCLA PRPs

Carrie Greco

The First Circuit Court of Appeals recently held that where a Potentially Responsible Party's (PRP's) pollution at a site is negligible, its equitable share of response costs is zero. In Acushnet Co. v. Mohasco Corp.,¹ the plaintiff, Acushnet Company, and other PRPs brought a CERCLA contribution claim against several PRPs for the clean up of a once pristine and picturesque area called Sullivan's Ledge in New Bedford, Massachusetts. The defendants included New England Telephone and Telegraph Company (NETT) for disposing telephone poles that contained some polycyclic aromatic hydrocarbons (PAHs); American Flexible Conduit (AFC) for disposing scrap cable containing lead, copper and zinc; New Bedford Rayon for its predecessor, Mohasco's disposal of rayon filament thread that contained sodium hydroxide, copper, and sulfuric acid; and Ottaway Newspapers, Inc. for its predecessor, New Bedford Standard Times' (NBST) disposal of ink sludge bursting with sulfuric acid, nitric acids, and various metals.²

The federal District Court granted NETT's summary judgment motion because the level of PAHs from the telephone poles could not have reached levels above the existing background levels of PAHs in the surrounding region and other sources contributed an overwhelming proportion of PAHs at the site. Regarding the other three defendants, the District Court ruled that the evidence was insufficient for "the calculus of appropriate proportional shares of liability" for response costs to be made.³ The Plaintiffs appealed this decision to the Circuit Court of Appeals.

The Circuit Court began its review by emphasizing that equitable allocation, not causation, remains the appropriate standard in determining the liability of a PRP.⁴ The First Circuit Court recognized that CERCLA liability is joint and several, but agreed with the Second Circuit's finding that where environmental harms are divisible, a defendant may be held responsible only for his proportional share of response costs.⁵ A PRP may escape liability for response costs, however, when the contaminant level from the PRP's substances is lower

¹ Acushnet Co. v. Mohasco Corp., 49 ERC 1136 (1st Cir., Sept 1999).

² Id. at 1138.

³ AFC was responsible for only one in 500,000th share, or \$100, an amount so low it was kept out. Mohasco's substances at the site were far smaller than the Plaintiffs' and chemical reactions with other materials could keep the substances from reaching the site. The case against the NBST was weaker than the other defendants, and the as to these other PRPs. Id. at 1138-39.

⁴ Id. at 1141.

⁵ Id. at 1142 (Citing United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993) which reaffirmed the Restatement (Second) of Torts).

than background levels of the surrounding area, and remain lower than those background levels even if the PRP's contaminants become concentrated with other chemicals. The judge has the discretion to decide when the PRP may reduce or escape liability.⁶ The First Circuit Court opinion cautioned that not all de minimis PRPs will elude liability, and that a PRP's liability must be justified by the record.⁷

The Circuit Court then looked to the record provided in the District Court's opinion. Regarding NETT's liability, the Circuit Court found that the District Court properly granted NETT's motion for summary judgment because the Plaintiffs failed to prove an issue of fact as to whether NETT's pollution at the Site was substantial enough to require a payment of response costs.⁸ Regarding the remaining three defendants, "the evidence was inadequate to permit a rational fact finder to make a quantifiable allocation of response costs to [the defendants]."⁹ The Court of Appeals concluded that the lower court's opinion clearly shows that the judge sufficiently analyzed the equitable factors and used these factors as the basis of his decision.¹⁰

The Plaintiffs argued that the lower court's holding that Plaintiffs failed to bring evidence to challenge the Defendant's stated allocable share brings too great of a burden on them.¹¹ Plaintiffs implied that the Consent Decree created a presumption of guilt and that they were placed in a position to prove their innocence. The court disagreed.¹² The judge found that all parties began the case on equal ground and that no one party had any special burdens and no adverse inferences were drawn from the existence of a Consent Decree. The Plaintiffs, nonetheless, still had the burden to prove their contribution claims. The court then dismissed the Plaintiffs' request for remand to be heard before a full and fair hearing.¹³

This case illustrates that small parties need not succumb to the settlement demands of state or federal regulators or PRP groups merely because of the threat of joint and several liability. Although one may argue that this decision discourages the PRPs who carry a larger share of potential liability from settling with government agencies with the intent to recoup money from the PRPs who carry a smaller share of liability, this case gives the PRPs with a smaller share of liability a means to fight back by taking the case to court to limit or avoid liability. (Ms. Greco/LIT)

National Trust for Historic Preservation v. Blanck

MAJ Michele B. Shields

In National Trust for Historic Preservation v. Blanck,¹⁴ the plaintiffs sought declaratory and injunctive relief to compel the Army to preserve the National Park Seminary Historic District, a community of buildings on the National Register of Historic Places, at Forest Glen, an annex of Walter Reed Army Medical Center. Both parties moved for summary judgment

⁶ Id.

⁷ Id.

⁸ Id. at 1143-44.

⁹ Id. at 1144.

¹⁰ Id.

¹¹ Id.

¹² Id. at 1145-46.

¹³ Id. at 1146.

¹⁴ 938 F. Supp. 908 (D.D.C. 1996).

and the plaintiffs subsequently filed a motion for a preliminary injunction.¹⁵ In a well-known opinion throughout Army environmental and historic preservation circles, the district court detailed several findings of fact and granted the Army's motion for summary judgment.¹⁶ This opinion was and still is considered an important case discussing Army compliance requirements under the National Historic Preservation Act (NHPA).

In June 1999, the plaintiffs filed an appeal in the United States Court of Appeals for the District Court of Columbia.¹⁷ The two issues plaintiffs raised on appeal were: 1) whether the district court's finding that the Army adopted a Cultural Resources Management Plan (CRMP) in 1992 as its Historic Preservation Plan (HPP) was arbitrary, capricious, and without support in its administrative record; and 2) whether the district court erred in holding that it lacked authority to enjoin the Army's "neglect" of the Historic District.¹⁸

During oral arguments, the three-judge panel focused its questioning on the first issue. The main thrust of the plaintiffs' argument, both in their brief and during oral argument, was that the administrative record did not contain any evidence to prove that the CRMP was ever approved or finalized by the Army "through command channels" in accordance with Army regulations, therefore, the district court erred in finding that the CRMP was the HPP and thereby satisfied the requirements of the NHPA.¹⁹ First, the Army argued that the appellants have no legal right to compel Army compliance with its own internal regulations.²⁰ Additionally, the Army responded that appellants' argument that the Army's failure to comply with internal regulatory routing requirements indicated a lack of finality of the CRMP was equally meritless.²¹ During oral arguments, the Army conceded that the administrative record contained no specific documents detailing command approval but argued that that issue was irrelevant since other documents included in the administrative record supported the Army's adoption of a final CRMP. For example, the Army's administrative record included memoranda sent outside the Army to other agencies, such as the Maryland Historical Trust, that documented the CRMP as a final plan adopted by the Army for preservation of the National Seminary Historic District.²² For all of the aforementioned reasons, the Army argued that the district court's decision was not arbitrary and capricious.

The United States Court of Appeals for the District Court of Columbia recently issued their opinion in National Trust for Historic Preservation v. Blanck.²³ In a one-page opinion, the Court of Appeals for the D.C. Circuit affirmed the district court's decision.²⁴ The Court of Appeals based their opinion on "the district court's conclusion that the Army's Cultural Resources Management Plan ("CRMP") was in fact the Army's Historic Preservation Plan ("HPP") and that it [the CRMP] satisfies Section 110 of the NHPA, 16 U.S.C. 470h-2, and the Secretary of the Interior's Section 110 guidelines, 52 Fed. Reg. 4727 (1988)."²⁵ The Court of Appeals briefly addressed the "command channels" process:

Although we find no basis for concluding that the Army satisfied its own internal procedures in adopting the CRMP as its HPP, *contra id.* at 923 & n. 17; see Army Reg. 420-40, ch. 2, 2-2g, 2-2h(1984), we do not reach the question whether the Army's failure to comply with its internal regulations

¹⁵ Id. at 909.

¹⁶ Id. at 908.

¹⁷ Brief of Appellants, NTHP v. Blanck, 398 F. Supp. 908 (D. D.C. 1996) (No. 97-5101).

¹⁸ Id. at 4.

¹⁹ Id. at 16, 19-23.

²⁰ Brief of Appellees at 19, NTHP v. Blanck, 398 F. Supp. 908 (D. D.C. 1996) (No. 97-5101).

²¹ Id. at 21.

²² Id.

²³ No. 97-5101, 1999 U.S. App. LEXIS 29703 (D.C. Cir. Oct. 22, 1999).

²⁴ Id.

²⁵ Id.

affects the propriety of its use of the CMRP as its HPP because appellants do not contend that such failure is an independent ground for reversal.²⁶

With this opinion, National Trust for Historic Preservation v. Blanck continues to be “good news” for the Army! As those in the environmental arena are aware, however, the plaintiffs will continue to fight for their causes despite the outcome of this case. In order to avoid additional and unnecessary litigation, historic preservation officers and environmental law specialists should continue to be meticulous when preparing and finalizing CRMPs as required by the new Army Regulation 200-4.²⁷ (MAJ Shields/LIT)

Clean Air Act Fines Update

Major Robert Cotell

As reported in the July 1999 ELD Bulletin,²⁸ on 22 July 1999 the U.S. Court of Appeals for the Sixth Circuit issued a bizarre decision on the issue of whether states can impose fines against federal facilities under the Clean Air Act (CAA). The court did not decide the case by interpreting the federal facilities section, but instead held that the savings clause of the citizen suits provision contained an independent waiver of sovereign immunity. Immediately following the adverse opinion the Department of Justice (DoJ) sought an en banc appeal of the ruling by the Sixth Circuit justices, but that request for was denied. Given DoJ's reluctance to pursue a Writ of Certiorari in the absence of a split among the circuits, the Sixth Circuit's decision will stand in the meantime. This issue is currently pending resolution within the Ninth Circuit, where the State of California appealed a district court decision holding that the CAA's federal facilities' section does not waive sovereign immunity for punitive fines.²⁹ Should the Ninth Circuit's decision create a split of authority among circuits, this could prompt a Supreme Court review of the matter.

In the meantime, installations within the Sixth Circuit (Kentucky, Michigan, Ohio, Tennessee) receiving CAA violations in the future are subject to state-imposed CAA fines for violations. All factual and legal defenses ordinarily available may be invoked in state administrative procedures, but the issue of federal sovereign immunity from state CAA fines has been settled within this jurisdiction. For installations outside the Sixth Circuit, the legal position of the United States has remains unchanged despite the Sixth Circuit decision. Installations receiving notices of violations in all jurisdictions other than the Sixth Circuit should remind regulators of the immunity and decline to pay any fines. A sample letter reminding regulators of sovereign immunity is contained in the March 1999 ELD Bulletin. (MAJ Cotell/CPL).

Section 8149 Update

Major Robert Cotell

On 23 November 1999 Gary D. Vest, Principal Assistant Deputy Under Secretary of Defense (Environmental Security) issued DoD guidance on the implementation of Section 8149 of the FY 2000 Defense Authorization Act. The Section requires DoD to request authorization from Congress before use of FY 2000 funds to pay fines or Supplemental Environmental Projects. The complete guidance letter is available at the following website: <http://www.denix.osd.mil/denix/Public/ES-Programs/Compliance/Memos/Section8149/note6.html>. In addition, Army ELD has published supplementary guidance to Army installations regarding

²⁶ Id.

²⁷ U.S. Dep't of Army, Reg. 200-4, Cultural Resources Management (1 Oct 1998).

²⁸ Mike Lewis, *Court of Appeals Renders Bizarre Decision on CAA Fines*, Environmental Law Division Bulletin, July 1999, at 11.

²⁹ SMAQMD v. United States, 29 F. Supp. 2d 652 (E.D. Cal. 1998).

implementation of Section 8149. The complete text of the Army guidance is reprinted below, and includes the DoD guidance noted above. (MAJ Cotell/CPL).

DAJA-EL (27)

3 December 1999

MEMORANDUM FOR U.S. Army Staff Judge Advocates

SUBJECT: Approval of Environmental Consent Agreements under the Defense Appropriations Bill for Fiscal Year 2000

1. This memorandum supplements guidance from Gary D. Vest, Acting Deputy Under Secretary of Defense (Environmental Security), dated 23 November 1999, Subject: Implementation of Section 8149 of the FY 2000 Defense Appropriations Act (Enclosure 1).
2. On 25 October 1999 the President signed the Defense Appropriations Bill for Fiscal Year 2000. Section 8149 of the Bill provides:

None of the funds appropriated in this Act may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law. For purposes of this section, expenditure of funds to carry out a supplemental environmental project that is required to be carried out as a part of such penalty shall be considered to be a payment of the penalty.
3. The above legislation will change the Army approval process for environmental consent agreements arising during FY 2000. In addition, it will affect consent agreements negotiated in previous years that require the expenditure of FY 2000 funds for completion.
4. This legislation does not alter installation commanders' basic authority to enter into consent agreements with federal, state or local environmental regulators to settle alleged deficiencies involving the assessment of fines. Likewise, authority to negotiate the provisions of environmental consent agreements with federal and state regulators will remain with installation environmental law specialists. Funds for the payment of such fines will continue to come from installation operations and maintenance accounts. Also remaining unchanged is the requirement (per paragraph 15-8, AR 200-1) that environmental agreements must be forwarded through command channels to ELD for review prior to signature.
5. In accordance with the above DOD guidance, all consent agreements negotiated in FY 2000 must now include the following provision:

None of the funds appropriated by Congress under P.L. Public Law 106-79 (FY 2000 Defense Appropriations Bill) may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by Congress. Under P.L. Public Law 106-79, expenditure of funds to carry out a supplemental environmental project that is required as part of a settlement of an enforcement action is considered to be payment of a penalty. **[name of installation]** agrees to request that the Department of Defense seek Congressional authorization of any payment or obligation under this consent agreement. In accordance with P.L. 106-79, however, **[name of installation]** will not make any payment with FY 2000 funds of a fine or obligation of funding for supplemental environmental projects pursuant to this agreement until such payment or obligation is first approved by Congress.

6. In light of the statutory requirement for Congress to approve payment for all fines and supplemental environmental projects, each consent agreement will require additional staff

coordination at HQDA before ELD will approve it for signature. To expedite this process, and to better ensure approval, installation environmental law specialists are now required to forward a settlement memorandum along with each draft agreement. The memorandum should conform to the format specified at Enclosure 2.

7. Upon receipt of the (unsigned) consent agreement and settlement memorandum, ELD will review and either recommend changes or approve signature by the installation commander, after coordinating the action within HQDA. If signature is approved the installation will be notified to sign the agreement and have the regulator sign. A copy of the signed version should then be provided to ELD expeditiously. The signed consent agreement and settlement memorandum will be forwarded by ELD, with a legislative proposal, to the Assistant Secretary of the Army, Installations and Environment (ASA(I&E)) for request to the Deputy Under Secretary of Defense Environmental Security (DUSD-ES) for a budget authorization request to Congress.

8. Please be advised that recent congressional inquiries have indicated that Congress will strictly scrutinize consent agreements in which installations have settled for amounts in excess of the original fines. Accordingly, review at both the ELD and ASA (I&E) level will focus on the advisability of such settlements. Justification for such settlements should be clearly specified in the settlement memorandum.

9. In addition to consent agreements that will be negotiated in FY 2000, some installations may have signed agreements in previous years which require the use of FY 2000 funds to complete supplemental environmental projects. Installations having such projects have already been contacted by ELD and an approval process similar to that specified above will be tailored to the circumstances of each case.

10. Questions regarding this matter may be directed to Major Robert J. Cotell, Compliance Branch at (703) 696-1593.

/S/

LAWRENCE E. ROUSE
COL, JA
Chief, Environmental Law Division

2 Enclosures
1-2. as

Enclosure 1

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

ACQUISITION AND
TECHNOLOGY
23 1999

NOV

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ENVIRONMENT & SAFETY)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(ENVIRONMENT, SAFETY & OCCUPATIONAL HEALTH)
DIRECTOR, DEFENSE LOGISTICS AGENCY, DLA-CAAE

SUBJECT: Implementation of Section 8149 of the FY 2000 Defense Appropriations Act

The Defense Appropriations Act includes a provision that requires the Department to request and receive statutory authorization before use of FY 2000 funds to pay for fines and penalties, including Supplemental Environmental Projects (SEPs) **Error! Bookmark not defined.** The President has directed the Department to seek this authorization **Error! Bookmark not defined.** This provision does not change the Department's requirement to comply with environmental statutes and regulations.

Implementation of this provision will be as follows:

- If an installation receives a proposed fine or penalty they must negotiate with the regulator in good faith in an attempt to reach an administrative settlement.
- Final administrative agreements shall include a clause stating that the installation cannot pay the final fine or penalty nor execute an SEP with FY 2000 funds unless specifically approved by Congress.
- DoD Components shall submit legislative proposals to this office within two weeks of final agreement between the installation and the regulator quantifying the fine, penalty, or SEP.
- This office will consolidate the submittals and present them to Congress according to Department policy on such proposals.

The provision does not prohibit nor inhibit negotiations with regulators, nor does it eliminate the Department's liability for fines and penalties. The provision only adds a step between settlement and payment - Congressional authorization - and we are committed to requesting Congressional authorization as quickly and efficiently as possible. Furthermore, we remain committed to achieving administrative settlement of proposed fines and penalties whenever possible. If your staff has questions about this policy, my point of contact is Ms. Maureen Sullivan, 604-0519.

Gary D. Vest
Acting Deputy Under Secretary of Defense
(Environmental Security)

2 Attachments:
as stated

Attachment 1

Making Appropriations for the Department of Defense for the Fiscal Year Ending September 30, 2000 and For Other Purposes, 106-371

Section 8149

None of the funds appropriated in this Act may be used for the payment of a fine or penalty that is imposed against the Department of Defense or a military department

arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law. For purposes of this section, expenditure of funds to carry out a supplemental environmental project that is required to be carried out as part of such a penalty shall be considered to be a payment of the penalty.

Attachment 2

November 4, 1999

STATEMENT BY THE PRESIDENT

THE WHITE HOUSE

Office of the Press Secretary

(Hartford, Connecticut)

For Immediate Release

November 4, 1999

STATEMENT BY THE PRESIDENT

I have signed into law H.R. 2561, the "Department of Defense Appropriations Act, 2000." The bill approves funds to cover the Department's most critical needs, consistent with my request that reflected my strong commitment to our Nation's security.

The bill provides funding for all critical Defense activities - pay and other quality of life programs, readiness, and weapons modernization. In particular, the bill fully funds the key elements of the compensation initiatives I proposed and that were enacted in the FY 2000 Defense Authorization Act, including military retirement reform, pay table reform, and a significant pay increase. It also fully funds my request for training, spare parts, equipment maintenance, and base operations - all items essential to military readiness. I am pleased that the bill restores partial funding for the F-22 fighter aircraft, which is essential to guaranteeing early air dominance in any future conflict.

Regrettably, the bill goes beyond what is necessary, providing funding for a host of unrequested programs at the expense of other core government activities. It provides \$267.4 billion in discretionary budget authority, a funding level that is \$4.5 billion above my request. As testified to by our military chiefs, my budget request correctly addressed our most important FY 2000 military needs. Unfortunately, H.R. 2561 resorts to a number of funding techniques and gimmicks to meet the Appropriations Subcommittee allocation. These include: designating \$7.2 billion of standard operation and maintenance funding as a contingent emergency; deferring payments to contractors until FY 2001; and incrementally funding a Navy ship (LHD-8).

Furthermore, the bill contains several objectionable language provisions. I am concerned about section 8074, which contains certain reporting requirements that could materially interfere with or impede this country's ability to provide necessary support to another nation or international organization in connection with peacekeeping or humanitarian assistance activities otherwise authorized by law. I will interpret this provision consistent with my constitutional authority to conduct the foreign relations of the United States and my responsibilities as Commander in Chief.

While I am troubled by a provision requiring the Department of Defense to seek

specific authorization for the payment of fines or penalties for environmental violations, I will direct the Department to seek such authorization on any fine or penalty it receives, ensuring full accountability for all such violations.

Furthermore, while the provision in section 8174 of the bill prohibits the Department from contributing funds to the American Heritage Rivers initiative, I will direct the Department, within existing laws and authorities, to continue to support and undertake community-oriented service or environmental projects on rivers I have recognized as part of the initiative.

Finally, the bill provides only about one-quarter of the funding level requested for construction of Forward Operating Locations that would reestablish regional drug interdiction capabilities in Latin America. This amount will not adequately support our vital drug interdiction efforts in the Western Hemisphere.

I have signed this bill because, on balance, it demonstrates our commitment to the military, meets our obligations to the troops, maintains readiness, and funds modernization efforts that will ensure our technological edge into the 21st century.

WILLIAM J. CLINTON

THE WHITE HOUSE, November 4, 1999.

Enclosure 2

CONTENTS OF CONSENT AGREEMENT SETTLEMENT MEMORANDUMS FOR SUBMISSION WITH REQUESTS FOR SECTION 8149 APPROVAL

Part I – Identifying Data

- (a) – Specify the date of the notice of violation (NOV)
- (b) – Identify the regulatory agency: EPA Region # or state regulator
- (c) – Statute alleged to have been violated (e.g., RCRA, SDWA)
- (d) – Single sentence summary of the general nature of the allegations
- (e) – Amount of fines assessed
- (f) – Status: Indicate the progress of the case in the administrative litigation process prior to reaching the settlement (e.g., complaint filed, answer filed, information exchange complete, case awaiting motions date by EPA Administrative Law Judge (ALJ)).

Part II – Factual Allegations and Defenses

Provide a complete statement of the facts alleged by the regulator to support its enforcement action, and indicate whether the installation has admitted or denied the allegations in its answer or other correspondence. Corresponding to each allegation, state specific defenses that would apply and identify the evidentiary strengths and weaknesses to proving these defenses.

Part III – Legal Analysis

List issues related to liability, citing the specific provisions of controlling law. Use subparagraphs with descriptive headings as appropriate. Address jurisdictional issues such as the authority of the regulator to impose fines, equitable defenses, or improper overfiling of state regulatory actions by EPA. With regard to each issue identified, discuss the extent to which the issues have been negotiated, briefed to ALJs, or argued. Provide an estimate of the likelihood of success on the merits if the case is contested at an administrative hearing.

Part IV – Penalty Calculation

Discuss the calculation of the penalty assessed by the regulator. If the regulator is the EPA, indicate the penalty policy used and state the determinations made by the regulator regarding, potential for harm, extent of deviation from requirements, gravity-based penalties, and use of multi-day penalties. Also discuss the calculation of any adjustment factors and whether the regulator has attempted to include recovery of economic benefits of noncompliance and whether the fine has been increased based on the size-of-violator factor. Indicate whether the regulator provided a formal written penalty calculation. If the regulator did not provide a written calculation, indicate any verbal calculations communicated. If the regulators provided no calculation at all, indicate what the installation believes would be an appropriate calculation. Provide an estimate of the likely penalty amount if the case is contested at an administrative hearing.

Part V – Supplemental Environmental Projects

Discuss any Supplemental Environmental Project (SEP) proposed to settle the case. Indicate the degree of offsetting credit the regulator is giving for the value of any SEPs. If the regulator is the EPA, indicate whether each of the SEP criteria has been met and whether the EPA has allowed any substantial deviation from the criteria. Thoroughly discuss the funding for the project. Indicate whether the project was commenced or completed before the NOV, after the NOV, after the NOV but before the consent agreement, or whether it will be initiated only after the consent agreement.

Part VI – Settlement Negotiations

Discuss negotiations and offers of settlement made to the regulators. Indicate any factors or issues affecting the regulator's negotiating position (e.g., history of installation noncompliance, status for public relations, demands for a minimum amount of a cash fine).

Part VII – Recommendation

State the reasons the consent agreement should be approved. Specific justification is necessary in all cases where the combined value of cash payments and SEPs exceeds the initial demand for fines. Identify how the installation benefits from the settlement and why settlement is preferable to contesting the case at an administrative hearing. If avoidance of the costs of administrative litigation and/or the avoidance of a potential penalty in an administrative hearing is part of the justification for settlement, indicate what the potential costs or penalties would be.